MASTER

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by California Trucking Association concerning the Department of Industrial Relations, Division of Labor Standards Enforcement "Interpretive Bulletin No. 87-5" (Overtime Exemption for Drivers Under Industrial Welfare Commission Orders)[1]	1988 OAL Determination No. 9 [Docket No. 87-015] June 9, 1988 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law was whether or not the Department of Industrial Relations, Division of Labor Standards Enforcement "Interpretive Bulletin No. 87-5" is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that part of this Bulletin is a "regulation" required to be adopted in compliance with the Administrative Procedure Act, and that part is not. The regulatory part of the Bulletin specifies how the driver's overtime exemption of Industrial Welfare Commission wage orders is to be interpreted prior to the effective date of Senate Bill 230.[2] The non-regulatory part of the Bulletin concerns application of the overtime exemption as of the effective date of Senate Bill 230.

THE ISSUE PRESENTED [3]

The Office of Administrative Law ("OAL") has been requested to determine[4] whether or not the Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement ("DLSE") "Interpretive Bulletin No. 87-5" ("Bulletin") is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore in violation of Government Code section 11347.5, subdivision (a).[5]

THE DECISION [6,7,8,9]

OAL finds that:

I. The part of the Bulletin that concerns the application of the driver's overtime exemption of Industrial Welfare Commission wage orders prior to the effective date of Senate Bill 230 (1) is subject to the rulemaking requirements of the Administrative Procedure Act ("APA")[10]; (2) is a "regulation" as defined in the APA, and (3) is in violation of Government Code section 11347.5, subdivision (a).

II. The part of the Bulletin that concerns application of the overtime exemption as of the effective date of Senate Bill 230 is not a "regulation."

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The Division of Labor Standards Enforcement (a division of the California Department of Industrial Relations) was created in 1976 by the enactment of Labor Code sections 82 and 83.[11] The California Labor Commissioner is Chief of the Division of Labor Standards Enforcement.[12]

The Division of Labor Standards Enforcement ("DLSE") is responsible for enforcing various provisions of the California Labor Code, including those involving wages, hours, and working conditions.[13]

Authority [14]

Due to the complexity of the organization of the Department of Industrial Relations, the extent of DLSE's rulemaking power is not readily apparent.[15,16] As this matter comes before us solely in the context of a request for regulatory determination, however, we need not reach any definitive conclusions with respect to the issue of "authority." (See note 14 for additional discussion.)

Applicability of the APA to Agency's Quasi-Legislative Enactments

Labor Code section 55 provides in part:

> ". . . Notwithstanding any provision in this code to the contrary, the Director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department. . . . [T]he director [of the Department of Industrial Relations] may, in accordance with [the APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purpose." [Emphasis added.]

Labor Code section 61 provides:

> "The provisions of Chapter 1 [Wages, Hours and Working Conditions] . . . shall be administered and enforced by the department through the Division of Labor Standards Enforcement."

Although Labor Code section 98.8 (quoted in note 15) authorizes the Labor Commissioner to promulgate rules and regulations without specific reference to the requirements of the APA, the above-quoted sections imply that rulemaking require-

ments of the APA are also applicable to the DLSE. In addition, the APA applies to all state agencies, except those "in the judicial or legislative departments."[17] Since DIR (that is, DLSE) is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to that agency.[18]

In its Response to the Request for Determination,[19] DLSE concedes that "the regulations promulgated by the Labor Commissioner are subject to the requirements of the APA."

General Background

To facilitate understanding of the issues presented in this proceeding, we discuss pertinent statutory and regulatory history as well as the undisputed facts and circumstances giving rise to the present Determination.

The Industrial Welfare Commission ("IWC") is authorized by Labor Code section 1173 to establish regulations governing the hours and conditions of labor and employment in the various occupations, trades and industries in California.[20] These regulations, in the form of "INDUSTRY AND OCCUPATION ORDERS" are found under Title 8, Chapter 5, Group 2 of the California Code of Regulations ("CCR").

The twelve specific IWC orders pertinent to this Determination relate to twelve separate industries.[21] Subdivision (3) of each of those orders provides that all workers are entitled to overtime wages for overtime hours worked, with the exception of those employees whose hours of service are regulated by ". . . [subdivision] (2) Title 13 of the California Administrative Code [now the California Code of Regulations], Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers."[22] (Emphasis added.)

A review of the regulatory history of the IWC wage orders[23] discloses that reference to Title 13, CCR, section 1200 was added to the driver's overtime exemption provision of the wage orders in 1980.[24] CCR section 1200 was adopted by the California Highway Patrol ("CHP") under the authority of Vehicle Code section 34501 to promote the safe operation of specified categories of vehicles. Prior to 1983, CCR section 1200 outlined the scope of subchapter 6.5 ("Motor Carrier Safety") by limiting the application of the provisions of that subchapter to the following vehicles and their operation:

> "Motortrucks with more than two axles, truck tractors, and all trailers, semitrailers, and auxiliary, logging, pole or pipe dollies used in combination with them.

"Two-axle motortrucks (excluding pickups) when coupled in any combination of vehicles exceeding 40 ft in length

"Buses
School Buses
School pupil activity buses
Farm labor vehicles"[25]

In 1983, the CHP amended CCR section 1200 by deleting the list of vehicles previously specified and by providing instead that the provisions of subchapter 6.5 shall apply to "farm labor vehicles and the vehicles listed in Vehicle Code Section 34500 and their operation."[26,27] Vehicle Code section 34500 contains a description of those vehicles whose safe operation will be regulated by the CHP. There are currently two versions of that section printed in the Labor Code. The version of Vehicle Code section 34500 which is operative until July 1, 1988 provides:

"The Department of the California Highway Patrol shall regulate the safe operation of the following vehicles:

(a) Motortrucks of three or more axles which are more than 6,000 pounds unladen weight.
(b) Truck tractors.
(c) Buses, schoolbuses, and youth buses.
(d) Trailers and semitrailers designed or used for the transportation of more than 10 persons, and the towing motor vehicle.
(e) Trailers and semitrailers, excluding camp trailers, trailer coaches, and utility trailers, pole or pipe dollies, auxiliary dollies, and logging dollies used in combination with vehicles listed in subdivisions (a), (b), (c), and (d). This subdivision does not apply to camp trailers, trailer coaches, and utility trailers.
(f) Any combination of a motortruck and any vehicle or vehicles set forth in subdivision (e) that exceeds 40 feet in length when coupled together.
(g) Any truck, or any combination of a truck and any other vehicle, transporting hazardous materials.
(h) Manufactured homes which, when moved upon the highway, are required to be moved under a permit as specified in Section 35780 or 35790.
(i) A park trailer, as defined in subdivision (f) of Section 799.24 of the Civil Code, which, when moved upon a highway, is required to be moved under a permit pursuant to Section 35780.
(j) Any other motortruck not specified in subdivisions (a) to (h), inclusive, that is regulated by the Public Utilities Commission ["PUC"] or the Interstate Commerce Commission ["ICC"], but only for matters relating to hours of service and logbooks of drivers."[28] [Emphasis added.]

The language in subdivision (j) was added to Vehicle Code section 34500 in 1981 by the enactment of Senate Bill 144,[29] authored by Senator William Craven.[30] Following the incorporation of Vehicle Code section 34500 in CCR section 1200 in 1983, DLSE applied subdivision (j) of section 34500 to exclude drivers regulated under the PUC or the ICC from the overtime wages benefits provided under the IWC orders.[31]

In March 1985, the California Teamsters Public Affairs Council ("Teamsters") petitioned the IWC to reconsider and to clarify the overtime provisions of its industrial wage orders.[32] Teamsters' position, which was supported by Senator Craven and the CHP, was that the Senate Bill 144 was not intended to alter the overtime protection afforded workers under IWC's wage orders. Teamsters' petition stated, ". . . the Craven bill was merely intended to increase the jurisdiction of the California Highway Patrol to regulate drivers' total hours of service."[33]

At the beginning of 1987, Teamsters requested Senator Craven's aid in an effort to halt DLSE's current "misapplication" of the driver overtime exemption.[34] That action led to the introduction of Senate Bill 230, which was approved by the Governor and filed with the Secretary of State in June 1987 and became effective January 1, 1988.[35]

Senate Bill 230 sets forth the following statement:

> "It is the intent of the Legislature, in enacting Section 34501.9 of the Vehicle Code, that the Industrial Welfare Commission's wage orders regarding driver's overtime exemptions be enforced as of the date the wage orders become effective until the time that they are changed by the commission during its regular hearing process."[36]

Vehicle Code section 34501.9 provides:

> "(a) Nothing in this division [Division 14.8, "Safety Regulations," sections 34500-34508] or the regulations adopted under this division is intended to, or shall, affect the rate of payment of wages, including, but not limited to, regular, premium, or overtime rates, paid to any person whether for on-duty hours or driving hours or otherwise.

> "(b) Nothing in this division or the regulations adopted under this division is intended to, or shall, affect the regulations adopted pursuant to other provisions of law concerning the rate or rates of payment of wages by any other public agency, including, but not limited to, the Industrial Welfare Commission or the Division of Labor Standards Enforcement of the Department of Industrial Relations."

The effect of Senate Bill 230 on the application of the driver's overtime exemption under the IWC wage orders was addressed in "Interpretative Bulletin No. 87-5," issued by the State Labor Commissioner for DLSE on July 16, 1987. (A copy of the Bulletin is attached as "APPENDIX A.") The Bulletin, directed to "All Professional Staff," states "The purpose of this memo is to provide guidance to Deputies in the interpretation and application of SB 230 as it relates to the overtime exemption for drivers in the Orders." Following a brief discussion of the history behind CCR section 1200 and Senate Bill 230, the Bulletin states:

> ". . . [E]ffective January 1, 1988, the overtime exemption in the Industrial Welfare Commission Orders is to be enforced as set forth in . . . [CCR section 1200, as it existed in 1980]. Only drivers of vehicles listed in Section 1200 . . . [as it existed in 1980] are entitled to an exemption from overtime pursuant to subparagraph (2) in Section 3 of the Orders. All other drivers, unless they are exempt for some other reason, must be paid overtime. However, for claims relating to overtime worked before January 1, 1988, pursuant to subdivision (j) in . . . [Vehicle Code section 34500], drivers whose vehicles were regulated by the PUC or the ICC will be considered exempt from overtime. If such drivers also worked overtime after January 1, 1988, they may be entitled to overtime for that period." [Emphasis added.]

On September 24, 1987, OAL received a Request from Thomas C. Schumacher, Jr., Executive Vice President of California Trucking Association ("CTA")[37] to make a determination as to whether "Interpretive Bulletin No. 87-5" is a rule or standard of general application and thus invalid and unenforceable unless adopted as a regulation in accordance with the requirements of the APA. It was asserted that many of CTA's members would be affected by implementation of that Bulletin.

With this complex factual background in mind, we now turn to the issues at hand.

II. DISPOSITIVE ISSUES

There are two main issues before us:[38]

(1) WHETHER THE RULES ESTABLISHED BY THE BULLETIN ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE RULES ESTABLISHED BY THE BULLETIN FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

A. FIRST, WE INQUIRE WHETHER THE RULES ESTABLISHED BY THE BULLETIN ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, does the informal rule either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

1. Part One - Does the Bulletin Establish Rules or Standards of General Application or a Modification or Supplement to Such Rules or Standards?[39]

The answer is "yes." It is manifest that "Interpretive Bulletin No. 87-5" establishes standards of general application. The challenged Bulletin explains how the driver's overtime exemption contained in the IWC wage orders will be applied prior to and following the effective date of Senate Bill 230. It is important to note that the Bulletin does not relate to a particular dispute or set of circumstances. Instead, it has statewide effect on the drivers of motor-trucks regulated by the PUC or the ICC under Vehicle Code section 34500, subdivision (j), as well as on the drivers of all other vehicles described in section 34500 which were not previously listed in CCR section 1200, as that regulation existed in 1980.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[40] That criterion is clearly met.

2. Part Two - Does the Bulletin Establish Rules Which Interpret, Implement or Make Specific the Law Enforced or Administered by the Agency or Governed by the Agency's Procedure?

The answer to this question is not as easily reached. We begin our analysis by identifying the individual rules being established.

The stated purpose of the Bulletin is "to provide guidance . . . in the interpretation of and application of SB 230 as it relates to the overtime exemption for drivers in the [IWC] Orders." (Emphasis added.) The guidelines set forth for interpreting the driver's overtime exemption (as quoted on page 7), however, do more than that. The Bulletin may be broken down into two distinct parts--(1) addressing how the overtime exemption should be read as of January 1, 1988 (the effective date of Senate Bill 230) and (2) addressing how the overtime exemption should be applied to claims relating to overtime worked before January 1, 1988.

Analyzing these rules in logical sequence, we find that the Bulletin's rule concerning the application of the driver's overtime exemption PRIOR to the effective date of Senate Bill 230 is an "interpretation" of the law and that the rule concerning the application of that exemption FOLLOWING the effective date of the bill is not.

a. Application of Exemption Prior to Senate Bill 230[41]

Fundamental to the issue of whether or not the prescribed application of the driver's overtime exemption prior to the effective date of Senate Bill 230 constitutes an "interpretation" by DLSE is the question of whether or not that exemption needs "interpretation." In a previous Determination, we stated:

> "If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created."[42]

Thus, if the driver's overtime exemption of the IWC orders may only be read one way prior to the effective date of Senate Bill 230--i.e., to require expansion of the exemption upon amendment of referenced CCR section 1200--then the Bulletin's rule concerning the proper application of the exemption is no more than a restatement of the law.

As noted, however, there has been great disagreement as to how the driver's overtime exemption should be enforced following the 1983 revision of CCR section 1200. The disagreement arises from the fact that the scope of that exemption is not clear. By leaving the parameters of the exemption to be established by an unspecified version of CCR section 1200, IWC left open the question of whether or not the scope of the driver's overtime exemption is defined by the version of the CCR section 1200 which existed at the time it was first referenced in the wage orders or by the version of that section which presently exists. The imprecise reference to CCR section 1200 in the driver's overtime exemption of the IWC wage orders raises the following questions:

1. Can reference to a provision that is subject to future change be presumed to be an adoption of all future changes?

2. Is the automatic amendment of a regulation due to the adoption of future changes legally valid?

Our analysis of these issues reveals viable arguments contrary to DLSE's view that the scope of the driver's overtime exemption was broadened by the 1983 amendment to CCR section 1200.

(1) Interpretation of Adoption by Reference

The California Supreme Court, in Palermo v. Stockton Theatres, Inc.,[43] stated:

> "'It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and that the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary. [Citations.]'[44] [Emphasis added.]
>
> ". . .
>
> "'It also [ ] [must] be noted that there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time, and (it may be assumed although no such case has come to our attention) as they may be subjected to elimination altogether by repeal. [Citations.]'" [Emphasis added.]

Although the above-quoted language referred to adoption by reference in a statute, it is equally applicable to regulations.[45] In applying the rules of construction stated by the Palermo court, we see that the IWC wage orders do not specify whether reference to CCR section 1200 is to the version of the section as it existed at the time of adoption or to the version which currently exists. In addition, we note that the IWC orders adopted a reference to a specific regulation and not to

a general body of law.[46] Consequently, absent any evidence to indicate that IWC had an intent to adopt all future changes to CCR section 1200, it must be presumed that the reference to that regulation is to the version which existed at the time it was first incorporated into the wage orders in 1980. Such a presumption supports the position that the driver's overtime exemption was not automatically expanded by the amendment of CCR section 1200, contrary to the position taken by DLSE.

(2) The Validity of Adopting Future Changes

The California Attorney General has stated:[47]

> "The California courts have consistently upheld the adoption of existing standards or regulations of other sovereignties including the federal government, [citations] and have made it clear that state agencies may be authorized to adopt such regulations by reference. [Citations.] Considerable doubt, however, has been cast on the ability of the Legislature to adopt such regulations prospectively. [Omitted footnote states: "Needless to say, if the Legislature may not take such action itself, it may not authorize an administrative agency to do so.] This doubt has been based on dicta in several holdings of the California Supreme Court in which the court, while upholding the adoption by reference of existing statutes, indicated its doubt as to the validity of adoption of such enactments prospectively.[48] [Citations.]
>
> "This has been the traditional view, and it has been given expression by many state courts. [Citations.]
>
> "The holdings have made no distinction between direct legislative adoptions and those made by state administrative agencies pursuant to statutory authority. [Citation.]
>
> "Such prohibitions have generally been based on two theories; the first and most popular being that delegation of prospective rule making power constitutes an unlawful delegation of legislative authority, and the second that, where criminal sanctions are involved, the standards relied on are void for vagueness. [Citations.]" [Emphasis added.]

Arguments against the validity of adopting future changes to the driver's overtime exemption are supported by such theories.

Initially, we note that IWC may arguably have exceeded its rulemaking authority in referring to an unspecified version of CCR section 1200 in its wage orders. By permitting the scope of the driver's overtime exemption to be defined (and possibly altered) by a CHP regulation, IWC has in effect "delegated" its power to amend the industrial wage orders to the CHP.

Labor Code section 1173 empowers the IWC to promulgate rules and regulations governing the hours, wages, and labor conditions. It does not, however, grant IWC the power to delegate that function. One might argue that Labor Code sections 1178, 1178.5, subdivision (c), and 1182, subdivision (a), suggest that IWC has no authority to do so.

Labor Code section 1178 provides in part:

> "If after investigation the commission finds that in any occupation, trade, or industry, the wages paid to employees may be inadequate to supply the cost of proper living, or that the hours or conditions of labor may be prejudicial to the health, morals, or welfare of employees, the commission shall select a wage board to consider any such matters . . . ." [Emphasis added.]

Labor Code section 1178.5, subdivision (c), provides in part:

> "Prior to amending or rescinding any existing order or adopting any new order, and after receipt of the wage board report and recommendation, the commission shall prepare proposed regulations with respect to the matter under consideration. The proposed regulations shall include any recommendation of the wage board which received the support of at least two-thirds of the members of the wage board. . . ." [Emphasis added.]

Labor Code section 1182, subdivision (a), provides in part:

> "After receipt of the wage board report and the public hearings on the proposed regulations, the commission may, upon its own motion, amend or rescind an existing order or promulgate a new order. . . ." [Emphasis added.]

Although IWC may disregard the wage board's recommendations, it appears the IWC may only adopt regulations after following the procedures established in the Labor Code.[49,50] Thus, it is arguable that IWC's "delegation" to the CHP of power to amend wage orders

avoids the procedural safeguards established by the Legislature--i.e., that IWC consider the recommendations of the wage board prior to rulemaking--and therefore is in excess of its authority.

Indeed, the California Supreme Court has held that:

> "[A]n administrative agency has only such authority as has been conferred on it."[51]
>
> "Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void. [Citations.]"[52]

Accordingly, if reference to an unspecified version of CCR section 1200 in the IWC wage orders (which permits amendment of those orders by regulatory action by the CHP) were viewed as an improper and unauthorized delegation of rulemaking power, then such reference would not be valid.

Even assuming arguendo that IWC had the authority to delegate its rulemaking power by way of adoption of future changes to be promulgated by another agency, it is likely that such adoption would nonetheless be invalid. If the LEGISLATURE cannot lawfully delegate prospective rulemaking power, then it follows that it cannot authorize an AGENCY to delegate such power.[53]

This principle is well illustrated in the case of People v. Kruger.[54] In Kruger, the court held that Fish and Game Code section 313, which enables the Fish and Game Commission to prohibit any act which is barred by existing and future federal rules or regulations implementing the Tuna Conventions Act, was an unconstitutional delegation of legislative power. The Kruger court stated:

> "Section 313 enables the commission to prohibit any act in turn barred by rules or regulations adopted pursuant to the Tuna Conventions Act. Such rules or regulations may include those to be enacted in the future as well as those presently issued. Whether or not the Legislature intended that the commission adopt prospective federal regulations, the state regulations have done just that. Section 108 of title 14 of the California Administrative Code declares that the state adopts the federal regulations at issue herein as they were then 'and as such regulations may be revised or amended in the future.' While existing statutes may be incorporated by reference, prospective incorporation has never been approved by a California court. . . .

> As the complaint charges defendant with a violation expressly based on the section (§ 108) which unconstitutionally delegates legislative power, . . . the conviction is invalid."[55] [Emphasis added.]

In addition to arguments premised on the theory of lack of authority, the validity of the adoption of future changes to the driver's overtime exemption might also be called into question on grounds of vagueness. With respect to this theory, we note that case law has established the following principles:

> "'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning or differ as to its application violates the first essential of due process of law.'"[56]
>
> "Civil, as well as criminal, statutes must be subjected to a void for vagueness examination."[57]
>
> "[H]igher standards of certainty [however] will be required of penal than of civil statutes."[58]

The automatic adoption of future changes to CCR section 1200 in the context of the driver's overtime exemption would arguably render the involved wage orders unconstitutionally vague. This position is strengthened by the fact that the IWC orders appear to be penal in character.[59]

It has been recognized that a statute is penal in character when the violation of that statute may lead to criminal penalties, notwithstanding the fact that the statute itself contains no penal provisions.[60] Since a violation of the IWC orders is punishable as a misdemeanor under Labor Code section 1199, subdivision (c), the wage orders may be viewed as penal in character. (See note 59) Such characterization of the wage orders subjects them to a higher standard of certainty and militates against DLSE's position that the driver's overtime exemption was altered by amendment to CCR section 1200.

Our discussion of the validity of the adoption of future changes in the driver's overtime exemption of the IWC wage orders should not be read as a conclusion that all incorporated references to unspecified versions of statutes or regulations are per se invalid.[61,62] For purposes of this Determination, it is sufficient to recognize that strong arguments exist against DLSE's "interpretation" that the scope of the driver's overtime exemption was expanded by the 1983 amendment of CCR section 1200.

As amply demonstrated, the proper application of the driver's overtime exemption contained in IWC's wage orders prior to the effective date of Senate Bill 230 is subject to more than one legally tenable "interpretation." First, it appears that IWC's reference to CCR section 1200 must be presumed to refer to the version of that regulation that existed at the time of reference. Secondly, it is arguable that the adoption of future changes by reference is unauthorized and/or constitutionally invalid. Thus, the Bulletin's statement of guidance as to the proper handling of "claims relating to overtime worked before [the effective date of Senate Bill 230]" cannot be characterized as a mere restatement of a self-executing provision. Instead, it is unquestionably an "interpretation" of the meaning of the driver's overtime exemption and constitutes a "regulation."

b. The Effect of Senate Bill 230

We now address the question of whether or not the Bulletin's statement of guidance with respect to the enforcement of the driver's overtime exemption after the effective date of Senate Bill 230 implements, interprets, or makes specific a provision of law or governs agency procedure. As in the previous analysis, the answer depends on whether or not DLSE's view is the only legally tenable "interpretation" of the law. We find that it is.

Both the language of Vehicle Code section 34501.9 and the corresponding statement of legislative intent adopted pursuant to Senate Bill 230 have been quoted in full above under the heading "General Background" and need not be repeated here. Suffice to say that Vehicle Code section 34501.9 declares that statutes governing the safe operation of vehicles on the road and regulations adopted to implement such statutes are not intended to and shall not affect the IWC wage orders. The meaning and purpose of Vehicle Code section 34501.9 is elaborated upon by the corresponding statement of legislative intent which reflects the Legislature's will to require that the IWC orders "be enforced as of the date the wage orders become [sic] effective until the time that they are changed by the commission during its regular hearing process."

It is well recognized that when the language of a statute is clear and unambiguous, there is no need for statutory construction.[63] In construing an ambiguous statute, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law.[64] All other rules of statutory construction must yield to this controlling principle.[65]

The California Supreme Court has stated:

> "Once a particular legislative intent has been ascertained, it must be given effect '"even though it may not be consistent with the strict letter of the statute."' [Citation] . . . '". . . The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."'"[66] [Emphasis added.]
>
> "The cardinal principal of statutory construction is that, absent a single meaning of the statute apparent on its face, we must give it an interpretation based upon the legislative intent with which it was passed, and where the Legislature has expressly declared its intent, we must accept the declaration. [Citation.]"[67] [Emphasis added.]

Even assuming that the effect of Vehicle Code section 34501.9 on the application of the driver's overtime exemption of the IWC wage orders is not evident on the face of the statute, the chaptered statement of legislative intent for the enactment of that statute leaves no doubt of the statute's effect in that regard. In addition, it is important to note that the purpose of the Bulletin was "to provide guidance . . . in the interpretation and application of SB 230 . . . ," not just Vehicle Code section 34501.9.

The Legislature's statement of intent is fully corroborated by the legislative record. The legislative record shows that the purpose of Senate Bill 230 was to require the enforcement of the driver's overtime exemption as of the date when the IWC originally adopted it and to prevent the expansion of the exemption by amendment of the Vehicle Code or regulations adopted thereunder unless IWC first goes through a formal rulemaking process.[68,69] Both the Senate Transportation Committee report and the Assembly Committee report on Senate Bill 230 reflect that the purpose of the bill was to end the current "misinterpretation" of the driver's overtime exemption which resulted from the 1983 amendment of CCR section 1200.[70] (See note 69.) It is clear that the intent of the Legislature in enacting Vehicle Code section 34501.9 was that the driver's overtime exemption be enforced as of the date the adoption of reference to CCR section 1200 became effective (on January 1, 1980), until such time that those orders were later amended by the IWC through its rulemaking process.

Under the above-quoted rules of construction, that intent controls the meaning of Vehicle Code section 34501.9. No other "interpretation" of that section is permissible. Consequently, the Bulletin's statement of guidance with respect to how the driver's overtime exemption is to be applied following the effective date of Senate Bill 230 does not constitute an "interpretation." The effect on the application of the driver's overtime exemption does not result from the issuance of that rule, but rather from the enactment of Senate Bill 230. Unlike the other rule established by the Bulletin, the statement of guidance concerning the effect of the bill is not a "regulation."[71,72]

WE THEREFORE CONCLUDE THAT "INTERPRETIVE BULLETIN NO. 87-5" IS IN PART REGULATORY AND IN PART NON-REGULATORY.

B. SECOND, WE INQUIRE WHETHER THE RULES ESTABLISHED BY THE BULLETIN FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to procedural requirements of the APA.[73] We need not reach any conclusion regarding the applicability of recognized general exceptions to APA requirements with respect to the Bulletin's rule which states the effect of Senate Bill 230 as that rule is not a "regulation." With respect to the Bulletin's rule which governs the application of the driver's overtime exemption of the IWC orders prior to the effective date of Senate Bill 230, however, we conclude that none of the recognized exceptions (set out in note 73) apply.[74]

III. CONCLUSION

For the reasons set forth above, OAL finds:

I. that the part of the Bulletin that concerns the application of the driver's overtime exemption of the IWC wage orders prior to the effective date of Senate Bill 230 (1) is subject to the rulemaking requirements of the APA; (2) is a "regulation" as defined in the APA; and (3) therefore is in violation of Government Code section 11347.5, subdivision (a).

II. that the part of the Bulletin that concerns application of the overtime exemption as of the effective date of Senate Bill 230 is not a "regulation."

DATE: June 9, 1988

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Determinations Unit

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1 In this proceeding, the Requester (California Trucking Association or "CTA", general office located at 1251 Beacon Blvd., West Sacramento, CA 95691, (916) 373-3500)) was represented by attorneys Richard W. Smith and Daniel J. McCarthy. The State Labor Commissioner (Division of Labor Standards Enforcement) was represented by Joan E. Toigo, Esq., Special Assistant to the Labor Commissioner.

2 Senate Bill 230, Statutes of 1987, chapter 70, resolved questions concerning the scope of the driver's overtime exemption. See discussion in text accompanying notes 32 through 34.

3 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute. In Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693, the court found--without reference to any of the pertinent case law precedents--that

the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism."

4 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a), provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

5 Government Code section 11347.5 (as amended by Stats. 1987, ch. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

6 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

7 Note concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected

rulemaking agencies but also all interested parties to submit written comments. The comment submitted by the affected agency is referred to as the "response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point in its response and to permit OAL to devote its resources to analysis of truly contested issues.

On April 21, 1988, OAL received a written comment from Barry D. Broad, counsel for the California Teamsters Public Affairs Council ("Teamsters"), which argues that "Interpretive Bulletin No. 87-5" is not an "underground regulation." On April 11, 1988, a written comment in opposition to the Requester was received from the Senator William Craven. On April 25, 1988, OAL received a written comment from Richard W. Smith and Daniel J. McCarthy, counsel for the Requester CTA, containing arguments in support of its position that "Interpretative Bulletin No. 87-5" is a "regulation." CAL subsequently received a written Response from Joan E. Toigo, Special Assistant to the Labor Commissioner (on behalf of the Division of Labor Standards Enforcement), to this Request for Determination and to the Requester's arguments.

The comments, as well as the Labor Commissioner's (DLSE's) Response, were considered in rendering this Determination. We note that the interested parties have all failed to distinguish between the two separate rules established by "Interpretive Bulletin No. 87-5."

8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on p. 1.

10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government

Code, sections 11340 through 11356.

11 Statutes 1976, chapter 746, sections 16 and 17.

12 Labor Code sections 21; 79; 82, subdivision (b); and 83, subdivision (b).

13 Labor Code section 61.

14 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that point in time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Government Code section 11349.1.)

15 Labor Code section 55 grants the director of the Department

of Industrial Relations (herein "department") general rulemaking authority. Section 55 provides in part that:

> ". . . Notwithstanding any provision in this code to the contrary, the director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department. . . . [T]he director may, in accordance with the [APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purposes." [Emphasis added.]

Labor Code section 56 provides:

> "The work of the department shall be divided into at least six divisions [one is] known as . . . the Division of Labor Standards Enforcement, . . . "

Labor Code section 59 provides:

> "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department." [Emphasis added.]

Labor Code section 61 provides:

> "The provisions of Chapter 1 [Wages, Hours and Working Conditions] (commencing with Section 1171) of Part 4 of Division 2 shall be administered and enforced by the department through the Division of Labor Standards Enforcement."

Labor Code section 98.8 provides:

> "The Labor Commissioner shall promulgate all regulations and rules of practice and procedure necessary to carry out the provisions of this chapter [Chapter 4, DLSE, sections 79-104]."

Labor Code section 1173 provides:

> "It shall be the continuing duty of the Industrial Welfare Commission, hereinafter referred to in this chapter as the commission, to ascertain the hours and wages paid to all employees in this state, and to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety, and welfare of such employees.
>
> ". . . The commission may, upon its own motion or upon

petition, amend or rescind any order or portion of any order or adopt an order covering any occupation, trade, or industry not covered by an existing order pursuant to the provisions of this chapter. . . . " [Emphasis added.]

Labor Code section 1193.5 provides:

"The provisions of this chapter shall be administered and enforced by the division [DLSE]. . . ."

16 The uncertainty concerning which officer(s) or component(s) within the Department of Industrial Relations possesses the power to issue formal regulations concerning the application of wage orders is reflected by the language of newly enacted Vehicle Code section 34501.9. Subdivision (b) of that section states:

"Nothing in this division or the regulations adopted under this division is intended to or shall affect the regulations adopted pursuant to other provisions of law or the rate or rates of payment of wages by any other public agency, including, but not limited to, the Industrial Welfare Commission or the Division of Labor Standards Enforcement of the Department of Industrial Relations." [Emphasis added.]

17 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).

18 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

19 Response, p. 7.

20 The orders of the IWC fixing minimum wages, maximum hours and standard conditions of labor for all employees, when promulgated in accordance with provisions of the Labor Code (e.g. sections 1178; 1178.5, subdivision (c); 1181; and 1182, subdivision (a)), are exempt from the procedural requirements of the APA. (Lab. Code, sec. 1185.)

21 Sections 11010, 11020, 11030, 11040, 11050, 11060, 11070, 11080, 11090, 11100, 11130 and 11140 of Title 8 of the CC-R--unless otherwise indicated, all further references to the

IWC orders will be to these sections. A review of the history of the IWC wage orders shows that those orders were adopted in the years 1947 (sections 11010 through 11100 were adopted as sections 11080, 11310, 11075, 11345, 11380, 11145, 11215, 11110, 11460 and 11040 respectively), 1963 (section 11130 was adopted as section 11127) and 1967 (section 11140 was adopted as section 11500), and that a driver's overtime exemption was added to those wage orders in 1976. (Register 47, No. 9, Sept. 18, 1947; Register 63, No. 9, June 1, 1963; Register 67, No. 45, November 11, 1967; Register 76, No. 41, Oct. 9, 1976.)

22 Title 8, CCR, sections 11010, subdivision (3)(G); 11020, subdivision (3)(G); 11030, subdivision (3)(G); 11040, subdivision (3)(H); 11050, subdivision (3)(H); 11060, subdivision (3)(G); 11070, subdivision (3)(H); 11080, subdivision (3)(G); 11090, subdivision (3)(H); 11100, subdivision (3)(H); 11130, subdivision (3)(G); and 11140, subd. (3)(D).

23 We reviewed pertinent California Regulatory Code Supplements (formerly known as the California Administrative Code Supplements). The California Regulatory Code Supplements are loose-leaf pages which update the California Code of Regulations. They are akin to the yearly "Pocket Supplement" parts of the annotated California Codes. The California Regulatory Code Supplements are referenced by a register number, order number, and date of publication (e.g. Register __, No. __, (date of publication)).

24 Although IWC had adopted the reference to CCR section 1200 in its orders in 1979, amendment of those orders did not become effective until January 1, 1980. At that time, the pertinent wage orders were numbered sections 11080, 11310, 11075, 11345, 11380, 11145, 11215, 11110, 11460, 11040, 11127, and 11500. Since then, those sections have been amended and renumbered as sections 11010 through 11100, 11130, and 11140 respectively. (Compare Register 80, No. 1, January 5, 1988 with Register 84, No. 23, June 9, 1984.)

The adoption of reference to CCR section 1200 in the IWC wage orders occurred prior to the establishment of OAL in July 1980. (Gov. Code, sec. 11340.1.)

25 Register 82, No. 44, October 30, 1982.

26 Register 83, No. 18, April 30, 1983.

27 CHP's notice of proposed regulatory change to CCR section 1200, published in the California Administrative Notice Register 83, No. 3-Z, January 21, 1983, p. A-4 (pursuant to Gov. Code sec. 11346.4) reflects that such amendment was made as a means of deleting unnecessary repetition of statutes and to avoid amendment of the regulation whenever changes in the Vehicle Code were made.

The "INFORMATIVE DIGEST" portion of the notice states:

> "Existing Section 1200 repeats the list of vehicles contained in Vehicle Code 34500. These changes make reference to the list instead of repeating it."

28 The version of Vehicle Code section 34500 that will become operative on July 1, 1988 adds to the list of vehicles to be regulated, the category of "general public paratransit vehicles."

29 Statutes 1981, chapter 675, sec. 2, at p. 2193.)

30 The language presently contained in subdivision (j) was added to Vehicle Code section 34500 as subdivision (h). (Stats. 1981, ch. 675, sec. 2, p. 2193.) Subdivision (h) was later relettered as subdivision (j) when section 34500 was amended in 1982. (Stats. 1982, ch. 789.)

31 The application of an expanded driver's overtime exemption is reflected in the testimony of Deputy Chief Labor Commissioner Albert Reyff at IWC's August 16, 1985 public meeting. The minutes of that meeting state:

> "Albert Reyff, representing the Division of Labor Standards Enforcement (DLSE), spoke about the division's frustrations in enforcing the exemption for certain drivers which appears in Section 3 of most of the IWC orders. Mr. Reyff stated the only drivers covered are those who drive 'two--axle vehicles less than 10,000 pounds who are <u>not regulated by the Public Utilities Commission</u>, and limousines.' Under the <u>present interpretation</u> of the orders, all other drivers are exempt and this means most drivers in California are not covered." [Emphasis added.]

DLSE's position that the driver's overtime exemption was broadened <u>by operation of law</u> is also reflected in its Re-

sponse to the Request, on page two.

32 Teamsters states that the amendment of CCR section 1200 incorporating Vehicle Code section 34500 was itself a response to the addition of subdivision (j) to section 34500. (But see note 27) As a result of these changes, it was now possible to construe the overtime provisions of the wage orders as excluding from coverage a greater number of employees than originally intended by IWC. Specifically, Teamsters notes that at the time IWC promulgated the overtime provisions of the Transportation Industry order (Title 8, CCR, section 11090(3)), employees who operated "motortrucks with two or more axles" were excluded from overtime coverage. Teamsters asserts that it was IWC's intent to exclude long-haul intrastate drivers of trucks with three or more axles from overtime coverage because long-haul drivers were covered by mileage based premium pay formulas which supplanted the need for overtime pay. With the amendment of CCR section 1200, however, the exclusion from overtime protection can arguably be read to extend to the driver of any two-axle vehicle regulated by the PUC. Such expansion of the overtime exemption would deny overtime pay to many short-haul drivers who are not compensated based on the total number of miles driven. Teamsters argues that such a result is inequitable and contrary to the original intent of the IWC.

33 See page four of the petition filed by Teamsters', dated March 15, 1985.

34 We note that Teamsters' petition was filed before the enactment of Labor Code section 1176.3 which now requires the IWC to make a timely response to all petitions.

35 Statutes 1987, chapter 70.

36 Statutes 1987, chapter 70, sec. 1, p. 11.

37 CTA is a non-profit mutual benefit corporation comprised of approximately 2500 members who are engaged in trucking and allied services.

38 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April

9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

39 By way of background, we note that regulatory "bulletins" have been condemned by the California Supreme Court [Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1], outlawed by the Legislature (Gov. Code sec. 11347.5), struck down by the California Court of Appeal [Ligon v. California State Personnel Board (1981) 123 Cal.App.3d 583, 176 Cal.Rptr. 717], and declared invalid in six earlier OAL determinations [1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-18; 1986 OAL Determination No. 4 (Board of Equalization, June 25,1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-7; and 1987 OAL Determination No. 4 (Division of Labor Standards Enforcement, March 25, 1987, Docket No. 86-010) California Administrative Notice Register 87, No. 15-Z, April 10, 1987; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987; 1988 OAL Determination No. 1 (Board of Prison Terms, February 16, 1988, Docket No. 87-007), California Regulatory Notice Register 88, No. 9-Z, February 26, 1988; and 1988 OAL Determination No. 8 (Board of Equalization, May 25, 1988, Docket 87-014, California Regulatory Notice Register 88, No. 23-Z, June 3, 1988.].

40 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

41 Whether the Requester had intended to challenge this particular rule is not significant. The Request for Determination states, "CTA requests that the Office of Administrative Law make a determination as to whether the State Labor Commissioner's Interpretive Bulletin 87-5 is regulatory in nature." That Request is sufficient to trigger OAL's review of the entire Bulletin under Government Code section 11347.5.

42 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-7 and B-15, typewritten version, p. 12.

43 (1984) 32 Cal.2d 53, 58-59, 195 P.2d 1.

44 Accord, People v. McGee (1977) 19 Cal.3d 948, 958, 140 Cal.Rptr. 657, 661, footnote 3.

45 "Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies . . . ." (California State Restaurant Association v. Whitlow (1976) 58 Cal.App.3d 340, 344, 129 Cal.Rptr. 824, 826.)

46 In Rancho Santa Anita v. City of Arcadia (1942) 20 Cal.2d 319, 125 P.2d 475, the California Supreme Court ruled that a statute's incorporation by specific reference to title IX of the Political Code was an incorporation of that title as it then existed and not as it is subsequently modified. In the matter before us, reference to a particular regulation in the wage orders is even more specific.

47 Public Health Regulations, 43 Ops.Cal.Atty.Gen 276, 277 (1964); accord, Safety Orders, 12 Ops.Cal.Atty.Gen. 231, 234 (1948).

48 For instance, in Brock v. Superior Court (1937) 9 Cal.2d 291, at page 297, the California Supreme Court held that

> "It is, of course, perfectly valid to adopt existing statutes, rules or regulations of Congress or another state, by reference; but the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power. [Citations.]" (Emphasis in original.)

The view that incorporation of prospective changes is invalid was apparently shared by the Third District Court of Appeal in California Association of Nursing Homes, Etc. v. Williams (1970) 4 Cal.App.3d 800, 84 Cal.Rptr. 590, in which the court reviewed the validity of an administrative regulation prescribing the standards which determine the level of state payments for the care of Medi-Cal patients in nursing and convalescent homes. In that case, the challenged regulation under review, section 51511 of title 22 of the CCR, established a standard for reimbursing nursing and convalescent homes by incorporating by reference the contents of a statement or document entitled "State Schedule of Maximum Allowances, Section II, Part C, Long-Term Care Facilities." The Third District Court of Appeal declared that:

> ". . . By fixing reimbursement in accordance with the Schedule of Maximum Allowances in effect at the time

services are provided, Regulation 51511 evidences a design to incorporate future changes in reimbursement standards adopted by the Department of Finance." [Id., 4 Cal.App.3d at p. 807, 84 Cal.Rptr. at p. 595.]

". . .

"The Attorney General is frank in stating: 'Insofar as the establishment of maximums [i. e., rate ceilings] are concerned, this was action taken by the Director of Finance.' To put the matter bluntly, Regulation 51511 is the product of the Department of Finance, not of the Medi-Cal agency. The latter's adoption of the former's fiat without independent consideration of the underlying evidence and without public or judicial access to it transgresses fundamental demands for the adoption of administrative regulations. [Footnote and corresponding text omitted.]" [Id., 4 Cal.App.3d at pp. 813-814, 84 Cal.Rptr. at p. 599.]

". . .

"There is no procedural barrier prohibiting the enacting agency from adopting by reference a set of standards issued by another agency if supporting evidence is made available at a public hearing, opportunity for refutation is given, the pro and con evidence considered and evidentiary material assembled in an identifiable record. On the other hand, an attempt to embody by reference future modifications of the incorporated material without additional hearings would have dubious validity. [Citation.]" [Id., 4 Cal.App.3d at p. 814, 84 Cal.Rptr. at p. 600; emphasis added.]

49 See United Air Lines, Inc. v. Industrial Welfare Com. (1963) 211 Cal.App.2d 729, 754-755, 28 Cal.Rptr. 238, 252. United Air Lines, Inc. was disapproved on other grounds in Industrial Welfare Commission v. Superior Court (1980) 27 Cal.3d 690, 728, 166 Cal.Rptr. 331, 353, footnote 1.

50 The Senate Rules Committee statement on Senate Bill 230, entitled "UNFINISHED BUSINESS," shows (on page 3) that the argument in opposition of the bill was based in part on the fact that IWC had recently committed to calling a wage board to study the problem of overtime regulations for drivers. Thus, it appears that IWC was prepared to conduct rulemaking pursuant to procedures established under the Labor Code.

51 Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 391-392, 211 Cal.Rptr.

758, 762.

52 Id., 38 Cal.3d at p. 391, 211 Cal.Rptr at p. 761.

53 Public Health Regulations, 43, Ops.Cal.Atty.Gen. 276, 277, footnote 1, (1964).

54 (1975) 48 Cal.App.3d Supp. 15, 121 Cal.Rptr. 581.

55 Id., 48 Cal.App.3d Supp. at pp. 19-20, 121 Cal.Rptr. at pp. 583-584.

56 People v. Grub (1965) 63 Cal.2d 614, 619, 47 Cal.Rptr. 772, 777; (Citations omitted).

57 Wingfield v. Fielder (1973) 29 Cal.App.3d 209, 218, 105 Cal.Rptr. 619, 624.

58 Lorenson v. Superior Court (1950) 35 Cal.2d 49, 60, 216 P.2d 859; (Citation omitted).

59 The Kruger case, discussed in the text on p. 14 and cited in note 54, fully supports this position. The defendant in that case was charged with and convicted of violating CCR section 108, which adopted federal regulations relating to the taking of yellowfin tuna. Although the regulation itself did not contain any penal provisions, the violation of that regulation nonetheless constituted a misdemeanor under Fish and Game Code section 12000. In reversing the judgement, the court declared:

> "[I]t should be observed that the defendant was afforded no notice that his conduct was criminal. In fact, section 8374 of the Fish and Game Code declares that yellowfin tuna 'may be taken at any time.' Only by noting section 313 which grants power to the commission to prohibit such taking and then searching out the relevant prohibitory federal regulations can one know of his criminality. Even then he may not gain such knowledge because the regulation may have been adopted after he had checked the federal register. Surely such notice does not afford a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' [Citations.]" [People v. Kruger, supra, 48 Cal.App.3d Supp. at p. 20, 121

Cal.Rptr. at p. 584.]

60 Benane v. International Harvester Company (1956) 142 Cal.App.2d Supp. 874, 880, 299 P.2d 750, 753.

61 The California Attorney General has pointed out that the issue of the constitutional validity of adopting regulations prospectively has not been settled (Airports, 33 Ops.Cal. Atty.Gen. 106, 109 (1959)) and has asserted that the current trend of legal writing supports the validity of such adoption based on the policy of uniformity of enforcement. (Public Health Regulations, 43 Ops.Cal.Atty.Gen. 275, 280-281 (1964).)

62 The California Attorney General has suggested that:

> "To avoid such constitutional and legal questions [pertaining to the validity of the adoption of prospective changes], the better approach would be for the Legislature, in its enactment or delegation, to identify with particularity existing codes by title and edition, such as was done by the Legislature in section 17922. By such method, there is no automatic incorporation by reference of future standards or codes, but rather, simply a declared policy of making our law or rules correspond with certain uniform, accepted standards." [Building Codes, 40 Ops.Cal.Atty.Gen. 223, 225 (1962); emphasis added.]

In the same vein, OAL adopted section 20 of Title 1 of the CCR to promote the clear designation of documents to be "incorporated by reference." As defined by subdivision (a) of CCR section 20, the term "'[I]ncorporation by reference' means the method whereby a regulation printed in the California [Code of Regulations] makes provisions of another document part of that regulation by reference to the other document." (Emphasis added.)

63 Solberg v. Superior Court (1977) 19 Cal.3d 182, 198, 137 Cal. Rptr. 460.

64 Wingfield v. Fielder, supra, 29 Cal.App.3d at pp. 218-219, 105 Cal.Rptr. at p. 624.

65 California School Employees Association v. Jefferson (Elementary) School District (1975) 45 Cal.App.3d 683, 691,

119 Cal.Rptr. 668, 674.

66 Friends of Mammoth v. Board of Supervisors of Mono County (1972) 8 Cal.3d 247, 259, 104 Cal.Rptr. 761, 769.

67 Tyrone v. Kelley (1973) 9 Cal.3d 1, 10-11, 106 Cal.Rptr. 761, 767.

68 "When determining the legislative purpose behind a statutory amendment, courts may properly rely not only upon its legislative history but also upon committee reports. [Citation.]" (Smith v. Rhea (1977) 72 Cal.App.3d 361, 369, 140 Cal.Rptr. 116, 120.)

". . .

"Statements in a report of a legislative committee concerning the object and purposes of a proposed amendment which parallel a reasonable interpretation of the amendment should be followed. [Citations.]" (Beltone Electronics Corp. v. Superior Court (1978) 87 Cal.App.3d 452, 455, 151 Cal.Rptr. 109, 110, footnote 1.)

69 The Senate Transportation Committee report on Senate Bill 230 (version 1/22/87) states:

> "Under other provisions of law and regulations, the Industrial Welfare Commission (IWC) has regulated wage and overtime payment guidelines for many intrastate commercial drivers. These regulations have included provisions exempting certain drivers from overtime pay provisions. In exercising this authority, the IWC orders have referenced certain types of vehicles regulated for safe operation by the CHP under Vehicle Code Section 34500. When Chapter 675 [Senate Bill 144] in 1981 expanded the pool of vehicles subject to CHP regulation, this action apparently was interpreted by the IWC as also expanding the pool of drivers exempt from overtime payment provisions.
>
> ". . .
>
> The bill's declarations would act to end the current misinterpretation by the IWC of the Vehicle Code provisions. It also would end the automatic extension of the IWC orders to additional drivers each time the CHP's jurisdiction was expanded. It is not known, however, whether the IWC could or would seek to continue its current interpretation of applicability through other

> regulatory provisions or procedures." [Emphasis added.]

The report of the Assembly Committee on Transportation on Senate Bill 230 (as amended April 21, 1987) states in part:

> "In 1982, SB 144 (Craven) was signed into law, extending the CHP's authority to regulate driving time to drivers of two-axle commercial vehicles. It is the author's contention that the IWC has misinterpreted the intent of SB 144, as it has also extended the exemption from overtime regulation given to drivers of larger commercial vehicles to drivers of two-axle commercial vehicles." [Emphasis added.]

70 It appears the same result was sought by the State Labor Commissioner. The Senate Rules Committee statement of "UNFINISHED BUSINESS" for Senate Bill 230 shows that the bill was amended by the Assembly on April 21, 1987 to include the statement of legislative intent. A handwritten note on the Senate Rules Committee statement indicates that the amendment was made "at the request of the Labor Commissioner." The handwritten note is supported by Senator William Craven's Senate Floor Statement that the Assembly amendment was "placed in the bill at the request of the . . . Commissioner."

71 The comment submitted by the Requester poses several arguments for the claim that the Bulletin's statement of guidance concerning the effect of Senate Bill 230 on the application of the driver's overtime exemption is a "regulation." We are not persuaded by the Requester's arguments.

The Requester first contends that Vehicle Code section 34501.9 is not a "self-executing" statute which affects the application of the IWC orders. It characterizes the statute as merely "a self-executing clarification of the status quo." (CTA Comment, p. 15.) In support of that argument, the Requester cites to a portion of an analysis of Senate Bill 230 from the office of the Legislative Counsel. On page three of a letter to the Honorable Gil Ferguson, dated June 2, 1987, John A. Moger, Deputy Legislative Counsel, wrote:

> "Nothing in Section 34501.9 would change the powers to adopt wage regulations by the Industrial Welfare Commission. However, Section 34501.9 would effect [sic] any interpretation that the Industrial Welfare Commission could not regulate the wage rates for employees whose

> hours of service are regulated by the cited federal or departmental regulations. Thus, the effect of Section 34501.9 would be to clarify the authority of the Industrial Welfare Commission to regulate wages while still authorizing the department to regulate hours of service."

We find the Requester's reliance on the above-quoted language to be misplaced. A review of the letter by Deputy Legislative Counsel Moger shows that the letter was in response to a specific request "to analyze [Senate Bill 230's] effect on wage rate regulation by the Industrial Welfare Commission." Page two of the letter states:

> "Section 34503 also provides that the rules and regulations under Division 14.8 preempt any ordinance or regulation of any other state agency or political subdivision of the state which are inconsistent with the rules and regulations adopted by the department under Division 14.8.
>
> "In this regard, you have requested that we consider the effect of Section 34501.9 on the regulations of the Industrial Welfare Commission which regulate the wages, hours, and working conditions of persons employed in the transportation industry pursuant to Section 1173 of the Labor Code." [Emphasis added.]

A reading of the entire letter by Deputy Legislative Counsel Moger discloses that the analysis contained therein was restricted solely to the question of whether or not Vehicle Code section 34501.9 would conflict with the authority of the IWC to regulate the wages to be paid to employees. The letter does not address the effect of Vehicle Code section 34501.9 on the application of the IWC wage orders.

The Requester next asserts that Vehicle Code section 34501.9 cannot be a "self-executing" statute as that statute is unconstitutionally vague and thus requires "interpretation." It argues that the first essential of due process of law demands statutory clarity, especially in the case of a penal statute like Vehicle Code section 34501.9. (CTA Comment, pp. 16-18.) Although it appears that the IWC orders may be viewed as penal in character (see text on p. 15 and corresponding note 59), the same is not true for Vehicle Code section 34501.9. The Requester's position is premised on the belief that a violation of Vehicle Code section 34501.9 would result in penalties under Labor Code section 1199, subdivision (c). It would not. Labor Code section 1199, subdivision (c) imposes penalties upon the violation of the IWC wage orders. Moreover, Vehicle Code section 34501.9 is not vague in our opinion. What may be characterized as vague is the proper application of the driver's overtime exemption of the

IWC wage orders prior to the enactment of section 34501.9. That statute was in fact enacted to remedy such vagueness.

The Requester appears also to argue that Vehicle Code section 34501.9 cannot be read as overruling IWC's wage orders since the rules of construction require that the integrity of both the statute and the wage orders be maintained if possible. (CTA Comment, pp. 16-17.) We note that Vehicle Code section 34501.9 has not repealed or rendered meaningless the IWC wage orders. In addition, it has not infringed upon the rulemaking powers of the IWC (as explained by Deputy Legislative Counsel Moger) and does not restrict how IWC may adopt or amend the wage orders in the future. Vehicle Code section 34501.9 simply corrects what the Legislature perceives as a misapplication of the driver's overtime exemption. That does not compromise the integrity of the wage orders.

72 DLSE's Response to the Request not only argues that the Bulletin is merely an explanation and repetition of legislative intent but also asserts that the main reason for issuance of the Bulletin was to provide its professional staff with a copy of the text of CCR section 1200 as it existed in 1980. That version is no longer contained in the current CCR. (See DLSE Response, at pp. 9, 12.)

73 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. The Determination Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8 473-6225. The price of the latest version of the Index is available upon request.

74 While both the Requester's comment and DLSE's Response discuss the applicability of recognized APA exceptions, their arguments focus on the applicability of those exceptions on the Bulletin's statement of the effect of Senate Bill 230. DLSE's contention that recognized exceptions apply is premised on the position that the Bulletin's statement is not a "regulation." (DLSE's Response, pp. 16-19.) DLSE has not argued that recognized exceptions to the APA would apply if any part of the Bulletin were found to be a "regulation."